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In the

Supreme Court of the United States

OCTOBER TERM, 1978

RAYMOND E. TRAFELET, DAVID A. CANEL, ARCHIBALD J. CAREY, JR., and BENJAMIN NELSON, individually and on behalf of all others similarly situated; and PETER FITZPATRICK, ALBERT W. WILLIAMS, and MELVIN B. LEWIS, individually and on behalf of all others similarly situated,

Petitioners,

v.

JAMES R. THOMPSON, as Governor of Illinois; STATE BOARD OF ELECTIONS OF THE STATE OF ILLINOIS; and JOHN W. COUNTRYMAN, as Chairman and Member, MICHAEL E. LAVELLE, as Vice Chairman and Member, and JOHN J. LANIGAN, J. PHIL GILBERT, RICHARD A. COWEN, CAROLINE R. CHAMBERLAIN, JOSHUA JOHNSON, and THERESA PETRONE, as Members of the State Board of Elections of the State of Illinois, and MICHAEL J. BAKALIS, Comptroller of the State of Illinois; ALAN J. DIXON, as Secretary of State of Illinois; ROY O. GULLEY, as Director of the Administrative Office of the Illinois Courts; and JOHN J. McDONNELL, LEHMAN KRAUSE, JAMES EDWARD DULL, and W. R. TODD, ALLEN HARTMAN, BRIAN B. DUFF, DAVID J. SHIELDS, JAMES A. ZAFIRATOS, ANTHONY J. BOSCO, MELVIN N. LANDAU, MICHAEL P. TOOMIN, MARVIN H. RUTTENBERG, and JAMES J. HEYDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented For Review	2
Statutes and Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. Section I of the Illinois Compulsory Retirement of Judges Act is invalid under equal protection and the First Amendment	9
II. The Illinois Compulsory Retirement of Judges Act violates the equal protection clause of the Fourteenth Amendment because of the classifications contained in Section 2 of the Act	19
Conclusion	25
APPENDIX	
Decisions of the Court of Appeals	App. 1

Table Of Authorities

Cases

Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill., 1973) 12

Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972) 8, 18

City of New Orleans v. Dukes, 427 U.S. 297, 303-305 (1976) 22

Communist Party v. Whitcomb, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974) 8

PAGE

Henderson v. Fort Worth School District, 526 F. 2d 286 (5th Cir., 1976) 15

Illinois State Board of Elections v. Socialist Workers Party, ... U.S. ....., 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979) 8, 10, 11, 19

Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) 24

Mancuso v. Taft, 476 F. 2d 187 (1st Cir. 1973) 13

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) 7

Oregon v. Mitchell, 400 U.S. 112 at 294-5, n. 14 (1970) .. 13

Storer v. Brown, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 714 (1974) 8

Vance v. Bradley, ... U.S. ....., 99 S. Ct. 939, 58 L. Ed. 2d [illegible] (1979) 8, 21

Watson v. Maryland, 218 U.S. 173, 176-77 (1910) 22

Williams v. Lee Optical Co., 348 U.S. 483, 489 (1955) .. 24

Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) 8, 11

STATUTES AND CONSTITUTIONAL PROVISIONS

Illinois Judicial Retirement Act

Ch. 37, Ill. Rev. Stat. (1977) §§23.71, 23.72 2

Laws 1965, p. 1792, §1 and §2 eff. July 20, 1965, as amended by Public Act 78-805, §1 eff. September 12, 1973 2

Illinois Constitution of 1970, Article VI 2

United States Constitution

First Amendment 3, 14

Fourteenth Amendment 3, 4, 14

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 594 F. 2d 623. It is reproduced in the Appendix hereto ("App").

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 16, 1979. Petition for Rehearing En Banc was denied April 24, 1979. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Illinois Compulsory Retirement of Judges Act, Ch. 37, Ill.Rev.Stats. (1977), §§ 23.71, 23.72, which provides for mandatory retirement of elected Illinois judges at age 70 and thus denies, by reason of age, judicial candidate access to the ballot and elector opportunity to vote for such candidates, violates the rights of such disqualified judges and voters under the equal protection clause of the Fourteenth Amendment and the First Amendment?

2. Whether the Illinois Compulsory Retirement of Judges Act violates the equal protection clause of the Fourteenth Amendment because of the classification contained in § 2 of the Act which suspends the Act with respect to judges in office on July 20, 1965, the effective date of the Act, and certain judges in office on June 30, 1973?

STATUTES AND CONSTITUTIONAL PROVISIONS ALLOWED

The Illinois Act in issue is appended [redacted] under which disqualification of Illinois judges by reason of age is mandated. Ch. 37, Ill. Rev. Stats. (1977) §§ 23.71, 23.72; Laws 1965, p. 1792, §1, and §2 eff. July 20, 1965, as amended by Public Act 78-805, §1, effective September 12, 1973.

The Illinois Constitution of 1970, Article VI [redacted] establishes normal qualifications for judicial office

and sets forth the requirements and procedures for election and retention election. It further permits the General Assembly to provide by law for retirement of judges at a prescribed age. It further provides machinery for removal of a judge found physically or mentally unfit to perform his duties.

Finally, the Fourteenth Amendment to the United States Constitution is relied on [redacted] as is the First Amendment.

STATEMENT OF THE CASE

Jurisdiction was asserted in the District Court based upon 28 U.S.C. §§1331, 1343(3), 1343(4), 42 U.S.C. §1983, the First and Fourteenth Amendments to the United State Constitution (and the pendent jurisdiction of the Court for claims not pertinent here). Declaratory relief was sought pursuant to 28 U.S.C. §§2201 and 2202.

1. Nature of the Case and Proceedings Below.

Two classes of Plaintiffs-Petitioners (hereinafter "Petitioners"") filed the Complaint herein, seeking declaratory and injunctive relief. The Judge Plaintiffs-Petitioners (hereinafter "Judge Petitioners")[1] brought suit on behalf of all judges of the Supreme, Appellate and Circuit Courts of Illinois, who are or will be subject to mandatory retirement under Illinois law at age 70 before the end of their certified terms of office, and who will be deprived of the right to run for re-election or retention election to judicial office because they have attained the age of 70. The Voter Plaintiffs-Petitioners (hereinafter "Voter Peti-

[1] Judges Trafelet, Canel, Carey and Nelson.

tioners")[2] brought suit on behalf of all registered voters of the State of Illinois who are or will be denied the opportunity to vote for the judicial candidates of their choice because they are or will be subject to mandatory retirement at age 70. The District Court certified both classes.

Count I of the Second Amended Complaint is the only Count pertinent here. It asserts that the Illinois Compulsory Retirement of Judges Act (hereinafter "the Act") violates the Equal Protection Clause of the United States Constitution, Fourteenth Amendment, in pertinent part because it disqualifies elected judges from holding office or running for reelection or retention after they attain age 70 and bars voters from voting for those judges; and further because the Act discriminates in its application to elected judges depending on their date of original election. Petitioners asserted that strict scrutiny was the required test under the Fourteenth Amendment because the Act operated to bar ballot access and voter choice.[3]

The District Court took evidence and entered Findings of Fact and Conclusions of Law on which judgment for defendants was entered. The Seventh Circuit Court of Appeals affirmed.

Judge Petitioners all held office as elected judges when the suit began. Because the Act mandated their retirement in December of 1978, and the disqualification of all of them to run for retention (as Judge Canel sought

[2] Petitioners Fitzpatrick, Williams and Lewis.

[3] Alternatively, it was asserted that if the rational relation test was applicable, the Act did not meet that test. That question and pendent claims alleged under Illinois law are not asserted as issues in this Petition.

to do that month) or reelection then or ever, they sought but were denied injunctive relief in the District Court and injunctive relief pending appeal. Likewise, their motion for expedited appeal was denied below. Accordingly, they all became disqualified in December of 1978, and lost office before the appeal was decided.[4] Petitioners sought a declaration that the Act violates the United States Constitution and a declaration that the Judge Plaintiffs are not disqualified from holding judicial office and seeking reelection to such office. Thus, should the judgment below be reversed, the declaratory relief requested would result in those ousters being declared void, and their rights to run for reelection restored.

2. Statement of Facts Pertinent to the Petition.

In 1965, the Illinois General Assembly approved mandatory retirement for judges at age 70.[5] Section 1 of the Act provides for judicial retirement immediately following the attainment of age 70.[6] Section 2 suspends the effect of mandatory retirement for judges in office in 1965 until eighteen years of judicial service, January 1, 1976 or age 70, whichever occurs last.

[4] Judge Canel was denied the right to run for retention election. The other judges, whose terms extended beyond that date, lost their offices.

[5] The 1970 Illinois Constitution authorizes the General Assembly to provide for the retirement of judges: "The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age. . . ." Art. VI, § 15a.

[6] Retirement occurs on the first Monday in December following the general election after the judge's 70th birthday. Section 1 of the Act.

In 1973 the General Assembly amended the Act (§2) to suspend its effect on "any Judge in office on June 30th, 1973" who could not fulfill minimum pension requirements upon becoming 70. According to the evidence, the purpose of the Amendment was to insure that loyal party performers would obtain minimum pensions.

No other Illinois State official is disqualified from completing the term of an elected office or seeking reelection because of a maximum age limit. No person is disqualified from seeking any other Illinois elected office because of attaining a maximum age.

Prior to 1976 approximately four judges were mandatorily retired. In 1976, twenty-nine judges were mandatorily retired pursuant to Section 1.

Since 1965, approximately forty-two judges have been excluded from the effect of the mandatory retirement provision by Section 2 of the Act. After the November, 1978 elections, fifteen of these judges remain on the bench, some of them until 1984, at which time they will be in their late seventies or early eighties.[7]

The named Voter Petitioners are three registered voters of Cook County, Illinois, who have voted for the named Judge Petitioners, and who desire to vote for Judge Petitioners in the future and for the election and retention in future elections of other judges in the class of Judge Petitioners.

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[7] A sixteenth judge, eligible to serve until 1980 and age 77, did not win retention, and was retired by the voters.

In Illinois eligible[8] persons are elected to the offices of Supreme, Appellate and Circuit Court judge. Initially, every candidate must seek election through the political process. An elected judge may seek to succeed himself by filing with the Secretary of State a Declaration of Candidacy before the election preceding the expiration of his term of office. A judge seeking "retention" election in this manner must receive the affirmative vote of three-fifths of the voters. While this method of reelection is preferred by judges, nothing in Illinois law bars a judge from seeking reelection through the normal political process, except for the Act in issue here which may disqualify a judge.

The Act in issue here clearly operates to disqualify any person, whether or not a sitting judge, from running for office initially, or running for reelection or retention, if that person has reached age 70, unless protected by Section 2 of the Act. Through such disqualification, the Act thereby stops voters from organizing to support and from voting for judicial candidates of their choice who have attained that age.

REASONS FOR GRANTING THE WRIT

Introduction

With respect to laws mandating age retirement of non-elected public employees, this Court has made clear that equal protection scrutiny is governed by the "rational relationship" test. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520

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[8] Eligibility requires that the individual be a United States citizen, a licensed attorney-at-law of Illinois, and a resident of the judicial unit which selects the individual. Art. VI, §11, Illinois Constitution of 1970

(1976); and *Vance* v. *Bradley*, ... U.S. ....., 99 S. Ct. 939, 58 L. Ed. 2d [redacted] (1979). But a number of decisions of this Court and the Circuit Courts, the latest being *Illinois State Board of Elections* v. *Socialist Workers Party*, ... U.S. ....., 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979), have held that any legislative classification that limits voter choice and candidate ballot access is subjected to a strict scrutiny standard. In this case, an Illinois statute is confronted which mandates disqualification for reelection and requires retirement of elected judges who attain age 70. Thus, the first question posed is whether the *Murgia-Vance* standard applies because age is the classification, or whether the *Socialist Workers* standard governs because the law bars access to the ballot and voter rights.

The Seventh Circuit decision is in conflict with *Socialist Workers* and other decisions of this Court and other Courts of Appeal wherein classifications that restricted ballot access and voter choice were reversed under a standard of strict scrutiny. *Williams* v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968); *Bullock* v. *Carter*, 45 U.S. 134, 92 S.Ct. 849, 31 L. Ed. 2d 92 (1972); *Communist Party* v. *Whitcomb*, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974); and *Storer* v. *Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 714 (1974). Further, in a democracy, any law that bars large numbers of qualified persons from public elected office because of maximum age restrictions poses an important public and constitutional issue that should be resolved by this Court.

A further question is posed by that aspect of the Illinois law which places certain judges in a more favorable posture than others, depending on their date of election (before 1965, the original law, or before 1973 in

the case of the 1973 amendment). Thus, many judges in Illinois remain eligible to remain in office and run for reelection until they reach their late 70's or early 80's in age.

The Seventh Circuit decision below is the first in which any court has applied principles which upheld so-called "grandfather clauses" of classification in cases of economic regulation, so as to permit classification between persons eligible to hold and run for public elected office. Again, such holding conflicts with the decisions imposing strict scrutiny to classification barring ballot access and voter rights, and conflicts with prior authority controlling "grandfather clauses" in economic cases. Finally, the issue of whether some people can be "grandfathered" into public office over others similarly situated who are disqualified, is one of great public and constitutional importance in a democracy.

For those reasons, more fully discussed below, the Writ should be granted.

I.

SECTION 1 OF THE ILLINOIS COMPULSORY RETIREMENT OF JUDGES ACT IS INVALID UNDER EQUAL PROTECTION AND THE FIRST AMENDMENT.

The Court below misapprehended the standards for review consistently asserted by Petitioners below. As shown by the Complaint they consistently asserted that (1) because the Act manifestly denies judges over 70 access to the ballot for retention or reelection, and denies voters rights to vote for candidates of their choice if those candidates are over 70, that Act is subject to strict scrutiny; but that (2) the Act also

falls under the rational relation test applied by the U. S. Supreme Court to age retirement statutes which did not cover elected officials. Thus, it was not accurate for the Panel to conclude that "the plaintiff judges here concede that the rational relationship standard is applicable and contend only that the Court failed to apply the correct standard properly." 594 F.2d 623 at 626.

The decision below referred to the decision of this Court just rendered in *Illinois State Board of Elections* v. *Socialist Workers Party,* ..... U.S. ....., 47 LW 4197 (Feb. 22, 1979), wherein the Illinois requirement for minimum signatures on petitions by independent candidates was held violative of the Fourteenth Amendment, and commented:

> Although language in that case, 47 U.S.L.W. at 4200, could be read as subjecting any classification that limits voters' choices, in whatever manner or however incidentally, to a strict scrutiny standard, we interpret that language as referring to the situation before the Court in that case and not as withdrawing *sub silentio* the statement in *Bullock* that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." 405 U.S. at 143. It was consistent with that statement to apply the strict scrutiny standard to a classification that "impairs the voters' ability to express their political preferences." 47 U.S.L.W. at 4200. In both *Bullock* and *Illinois State Board of Elections,* the classification burdened identifiable groups of candidates or voters, identifiable in one case by their economic status and in the other by their political preferences. 594 F2d 623 at 632.

Referring to prior Circuit opinions that it understood to support its reading of the Supreme Court opinion,

the Court below overlooked other precedent as well as the reasoning of this Court.

Socialist Workers was based on a vital premise:

> Restrictions on access to the ballot burden *two distinct and fundamental rights,* "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. (Emphasis added.)

Socialist Workers, Id, 47 U.S.L.W. at 4200, citing *Williams* v. *Rhodes,* 393 U.S. 23 at 30 (1968). This Court amplified its view of those "fundamental rights" which require strict scrutiny and must be justified by a "compelling state interest":

> The freedom to associate as a political party, a right we have recognized as fundamental, see id., at 30, 31, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." *Lubin* v. *Panish,* 415 U.S. 709, 716 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. *Wesberry* v. *Sanders,* 376 U. S. 1, 17 (1964); *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964); *Dunn* v. *Blumstein, supra,* at 336.
>
> *When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest. American Party of Texas* v. *White,* 415 U. S. 767, 780-781 (1974); *Storer* v. *Brown,* 415 U. S. 724, 736 (1974); *Williams* v. *Rhodes, supra,* at 31. To be sure, the Court has

previously acknowledged that States have a legitimate interest in regulating the number of candidates on the ballot. * * [Citing *Lubin* v. *Panish, supra,* and *Bullock* v. *Carter,* 405 U. S. 134, 145 (1972)] * * *

Consequently, we have upheld properly drawn statutes that require a preliminary showing of a significant modicum of support" before a candidate or party may appear on the ballot. *Jenness* v. *Fortson,* 403 U. S. 431, 442 (1971); see, e.g., *American Party of Texas* v. *White, supra.*

However, our previous opinions have also emphasized that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." Kusper v. *Pontikes,* 414 U. S. 51, 59 (1973), *and we have required that States adopt the least drastic means to achieve their ends. Lubin* v. *Panish, supra,* at 716; *Williams* v. *Rhodes, supra,* at 31-33. *This requirement is particularly important where restrictions on access to the ballot are involved. Socialist Workers,* Id, 47 U.S.L.W. at 4200. (Emphasis added.)

Finding that the Illinois Legislature had not used "the least restrictive means of protecting the State objectives," the Illinois signature requirement was stricken. In his concurring opinion, Mr. Justice Blackmun made clear that he read the majority opinion to constitute a "strict scrutiny approval for election cases" in which he joined. Id, 47 U.S.L.W. at 4201.

The ruling in *Socialist Workers* was anticipated by similar statements from Chief Circuit Judge Swygert in the Seventh Circuit and in recent opinions by the First and Fifth Circuits.

In *Blassman* v. *Markworth,* 359 F. Supp. 1 (N.D. Ill., 1973) (three Judge panel), a case in which a *minimum*

age qualification for school board candidates was upheld, Chief Circuit Judge Swygert stated in his concurring opinion the general rule that:

> ". . . *any state action that substantially restricts the right to candidacy* must be given strict scrutiny and meet the test that the restriction is justified by a compelling state interest." 395 F. Supp. at 8. (Emphasis supplied.)

Judge Swygert cited *Mancuso* v. *Taft,* 476 F. 2d 187 (1st Cir., 1973), for that proposition, and concurred in Judge Decker's opinion in *Blassman* upholding the minimum age restriction only because until adoption of the Twenty-Sixth Amendment, the minimum age of 21 for voting could not, by reason of the Fourteenth Amendment, be exceeded by the states.[9]

> ". . . *so long as a State does not set the voting age higher than 21,* the reasonableness of its choice [at or below that age] is confirmed by the . . . Fourteenth Amendment. . . ." (Emphasis added.)

In that context, Judge Swygert's citation of *Mancuso* v. *Taft, supra,* is instructive. In *Mancuso,* a city police officer attacked part of a city home rule charter that barred him from continuing in his employment if he ran for public office. Viewing the charter as an effective limit on both candidate and voter rights, the First Circuit struck the law, holding:

> ". . . that candidacy is both a protected First Amendment right and a fundamental interest. *Hence any legislative classification that significantly burdens that*

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[9]Judge Decker in *Blassman,* 359 F. Supp. at 6 relied on the statement of Justice Stewart concurring in *Oregon* v. *Mitchell,* 400 U.S. 112 at 294-5, n. 14 (1970),

interest must be subjected to strict equal protection review." 476 F. 2d at 196 (Emphasis added.)

After discussing the First Amendment rights affected by curbs on candidacy, that Court found that because candidacy is both a First Amendment right and a fundamental interest, any legislative classification that burdens that interest must be subjected to the strict scrutiny test under Fourteenth Amendment equal protection standards:[10] Finding the flat prohibition against any candidacy to be overinclusive and not reasonably necessary, the Court struck it.

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[10] In *Mancuso, supra,* the Court stated:

"Standard of Scrutiny

"Appellee's complaint, simply put, is that Cranston has divided its citizenry into two groups for purposes of candidacy for public office: in one group, all classified civil servants, who are prohibited from filing as candidates; and, in the other, all other citizens, free to run for office, subject only to general age and similar requirements.

• • •

The Supreme Court has tended to use one of two standards for review when determining whether a particular state action violates the equal protection clause of the Fourteenth Amendment. *For state action concerning economic regulation* and taxation, the Court has employed a relaxed review, upholding the challenged action if it is sustained by some rational and legitimate state interest. • • • *For state action which substantially infringes fundamental interests, however, the Court has subjected the state action to stricter scrutiny,* requiring the state to show that its action is necessary to promote a compelling state interest.

In evaluating candidacy restrictions there are two interlocking interests, both fundamental, that must be

Since *Mancuso, supra,* the Fifth Circuit also applied the strict scrutiny test to a state law burdening candidate and voter rights by imposing a three-year residency requirement "as a qualified voter" on candidates for school boards. *Henderson* v. *Fort Worth School District,* 526 F. 2d 286 (5th Cir. 1976). Since three years of residency required also that candidates be "qualified voters"

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[10] (Continued)

considered. We naturally consider the rights asserted by the plaintiff in claiming the opportunity to become a candidate for public office. But whenever a state or city regulates the right to become a candidate for public office, it also regulates the citizen's right to vote; the person or persons whose candidacy is affected may be the voters' choice for public official.

• • •

A. Voting Rights

In *Bullock,* the Chief Justice stated that not every candidate restriction affects the right to vote sufficiently to require a strict equal protection review of the restriction. The task of the federal courts is to 'examine in a realistic light the extent and nature of their impact on voters.' 405 U.S. at 143, 92 S. Ct. at 856. • • •

We note initially that while in *Bullock* the filing fees were so large that they indirectly limited the pool of candidates, *here the pool is directly and substantially limited by a prohibition on the candidacies of a specific class of people*—the public employees of Cranston. • • •

Secondly, the Cranston charter *excludes a specific group with unique qualifications for public office.* City employees have made government their daily work. They see the work of government within their department and as their department deals with the public and other parts of government, local, county, state, and national. They ought to be able to pinpoint problems and formulate solutions much more effec-

during that period, the Court viewed the restriction as imposing a minimum age (at least three years older than the voting age) as well as a residency requirement. 526 F. 2d at 289. The barrier of three year residency and age restrictions before the Court in *Henderson* was seen to be of such impact as to warrant strict construction:

> "*It is absolute in its operation. No exception is made for expertise,* familiarity, or the extent of political support. . . ." 526 F. 2d at 291-2.
>
> • • •
>
> ". . . denies access to what must be assumed is a *significant number of potential school board candiduties, and on that basis the statute's impact on voters is substantial.*" 526 F. 2d at 292 (Emphasis added.)

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[10] (Continued)

tively than many other citizens. *The experience and insight garnered from day-to-day grappling with the bureaucracy could well make these individuals particularly attractive to the voters. For these reasons, then, we find that the fundamental interest of the right to vote is significantly affected by* §14.09(c) of the Cranston charter *and that therefore strict equal protection review must be applied.*

B. First Amendment Rights

We now inquire whether the interest of the individual in running for public office is an interest protected by the First Amendment, so that any law which significantly infringes that interest must be given strict review. The Supreme Court has never directly decided this point. However, Williams v. Rhodes, supra, strongly suggests that the activity of seeking public office is among those protected by the First Amendment. • • •

The right to run for public office touches on two fundamental freedoms: freedom of individual expression and freedom of association. • • • 476 F. 2d at 192-95. (Emphasis added.) (Footnotes omitted.)

In language directly applicable herein, the court in *Henderson, supra,* rejected the asserted purpose of the statute:

> "The argued justification for section 7 is the state's interest in a ballot composed of knowledgeable and qualified candidates for the increasingly complex job of school board member. However, voter registration for a period of three years *is, at best, a crude index of the capabilities of a potential candidate. The background, experience, and political views of the potential candidate are, among others, the indicia of merit and capability. No one contends, or could, that the state is empowered to impose qualifications or requirements in these areas.* On the contrary, the power to make necessarily subjective discriminations on the basis of background, experience, or political philosophy *rests with the voters* of the Fort Worth School District. *It can be assumed that opposing candidates will bring deficiencies in any of these areas to the attention of the voters.*" 526 F. 2d at 292. (Emphasis added.)

Here as well the legislative interest asserted by defendants at trial—that of promoting a "more vigorous judiciary" through mandatory retirement by age limit — imposes what is "at best, a crude index of the capabilities of a potential candidate." Here, too, the deficiencies in vigor of any judge — should one slip by the heretofore completely effective devices employed in Illinois for early retirement of non-vigorous judges[11] — can be brought to the attention of the voters. Here, as in *Henderson, supra,*

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[11] On the record below, it was uncontradicted that informal efforts of Court administrators in Illinois, backed by enforcement machinery, brought voluntary retirement of all non-vigorous judges, leaving only vigorous judges to be retired by reason of age.

the Retirement Act "is absolute in its operation", and "no exception is made for expertise" or, for that matter, judicial vigor. Thus strict scrutiny is likewise applicable herein, and for the same reason the Retirement Act cannot survive that scrutiny.

Arguments and briefs to the District Court and Seventh Circuit below asserted under the Fourteenth Amendment both the strict scrutiny test based on denied ballot access and voter rights, and alternatively, the rational relationship test based on precedent in cases dealing with age retirement of non-elected persons. The District Court blow dealt only with the rational relationship test. The Findings reflect no examination of "the extent and nature of [the] impact on voters" of the restriction at issue here, as required by *Bullock* v. *Carter*, 405 U.S. 134 (1972). The District Court's Conclusions of Law similarly fail to address that issue. They state only:

> "17. The rights of the class of plaintiff voters do not exceed the rights of the class of plaintiff judges. Since the class of plaintiff judges are lawfully subject to the terms of the Act, no rights of the class of plaintiff voters are impaired."

Nor did the Court of Appeals carry out the analysis required by *Bullock*. The Court of Appeals sought to limit strict scrutiny to ballot restrictions applicable "to exclude candidates of an identifiable group [limited to economic status] or viewpoint." 594 F.2d at 632 (insert supplied). That view conflicts with the premise of democracy —that for all elective offices, the voters decide who is qualified, or "vigorous" for that matter, except in limited areas strictly reviewed.

Political preferences and viewpoints are not limited to political parties but are also expressed through support

of candidates and identification with voter constituencies based on a wide variety of factors including their stand on issues, occupation, personal background and age. A reality ignored by the court below is that older voters represent an important and growing political constituency. The principle of *Socialist Workers Party* and similar cases is not confined to political preferences of candidates and voters of a particular political party.The Court of Appeals decision would permit a Legislature to cut off a 60 or 65 year old Governor or other official from reelection, or impose some other maximum age based on "any state of facts" that may be argued, so as to open those offices for other persons, subject only to the "rational relation" test. Surely the right to run for office and the right to vote for candidates does not rest on such a weak Constitutional base.

II.

THE ILLINOIS COMPULSORY RETIREMENT OF JUDGES ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE OF THE CLASSIFICATIONS CONTAINED IN SECTION 2 OF THE ACT.

As previously shown, Section 2 of the 1965 Act deferred for up to eighteen years the retirement of many judges sitting when the law was passed in 1965, and by 1973 amendment permitted some judges to sit beyond age 70 until obtaining pension benefits. The record shows that Section 2 was added after the law failed of adoption in 1963, and there was need to broaden protection to sitting judges so as to obtain necessary support in the Legislature. Thus, sitting judges were protected in their rights to sit long enough to earn maximum retirement benefits. The net result was to protect some judges in their right

to serve into their late 70's and 80's, many of whom still continue to serve. Those judges have the same duties as those in the Judge Petitioner Class, and each judge in both groups must of course stand for election and re-election at the end of each term. Thus, judges similarly situated are treated differently by the Act, depending on when they took office. It has nowhere been suggested that the date of the protected judges taking office prior to 1965 has any relation to the vigor or other capacity of judges at age 70. Nor was any explanation offered for the 1973 special savings clause, except the testimony that it was enacted to protect one or more judges deemed loyal party workers — again, a purpose unrelated to any purpose asserted or contemplated by the lower courts for mandatory retirement.

Thus, part of the affected class of judges was protected for reasons having no relation to any purpose suggested for retirement based on age. Indeed, if retirement based on age is found to be rationally related to a proper purpose, then holding some judges in office past that age is directly contrary to any such purpose.

For reasons set forth in Part I of this Petition, this distinction between judges disqualified from elective office and those "grandfathered" into office cannot stand strict scrutiny under the Fourteenth Amendment.

Moreover, authority supporting "grandfather clauses" which discriminate in favor of members of class is not applicable here because such authority (1) is limited to economic regulation, not access to elected public office, (2) requires the exception to be related to the purpose of the law itself, not some other purpose, and (3) Illinois judges reenter the class anew each time they run for reelection or retention.

The Court of Appeal's rejected the challenge to the Act based on reading §2 thereof in conjunction with §1. It first cited *Vance* v. *Bradley,* ..... U.S. ....., 41 U.S.L.W. 4176 at 4181 (Feb. 22, 1979) as authority that §2 "may be rationally related to a different legitimate state interest [than that asserted or considered for §1], and constitutional for that reason." 594 F.2d at 630 (insert supplied.) But while *Vance* at the portion cited may be read to permit a court to consider any possible rationale to justify a statute not governed by strict scrutiny, that case did not deal with distinctions within an affected class. The law in *Vance* affected all foreign service officers.

The Court of Appeals reasoned that the §2 distinction between judges was justified because it enabled judges elected prior to the enactment of mandatory retirement to obtain judicial pensions. The Court reasoned that those judges had relied on the absence of mandatory retirement at the time of their election, and therefore the Legislature could give them special protection to enable them to obtain their pensions. 594 F.2d at 630-1, [redacted]

To the contrary, it is clear from the record that the judges in office in 1965 were judges who were elected or appointed between 1962 and 1965, at a time when the former Illinois Constitution permitted the enactment of judicial mandatory retirement. Thus, such judges cannot be said to have relied on the absence of mandatory retirement. And the 1973 sitting judges who were specially protected clearly had no such reliance interest.

Moreover, the law does not support the classification here. To be constitutionally valid the classification must be rationally related to some purpose of the Act itself. No such showing was made or found below.

In *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976), this Court considered an ordinance prohibiting street vendors in the City's "French Quarter." The ordinance exempted from its provisions vendors who had continually operated their businesses in the French Quarter for a period of at least eight years prior to the effective date of the Act. Faced with plaintiff's equal protection challenge to the ordinance, the Court first recognized that the legislature may permissibly choose to implement its economic regulations "step-by-step," but then considered whether the exemption created by the grandfather clause rationally furthered the City's purpose in passing the new law. 427 U.S. at 303. The Court found that the purpose of the ordinance was to preserve the charm and beauty of the French Quarter, and noted that the vendors exempted from the statute's prohibition "had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre." *Id.* at 305. Based upon this recognition, the Court found that the

> "city's classification *rationally furthers the purpose which . . . the city had identified as its objective in enacting the provision,* that is, as a means 'to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists.'" 427 U.S. at 304.

In other cases in which a clause excepting certain individuals from a licensing statute has been expressly discussed, the classification so established rationally furthered the state's interest, as evidenced by the overall statutory scheme. See, *e.g.*, *Watson* v. *Maryland*, 218 U.S. 173, 176-77 (1910):

> "In such statutes there are often found exceptions in favor of those who have practiced their

> calling for a period of years. In the *Dent* case [*Dent* v. *West Virginia*, 129 U.S. 114 (1889)] an exception was made in favor of practitioners of medicine who had continuously practiced their profession for ten years prior to a date shortly before the enactment of the law. *Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts.*" (Emphasis added.)

In these and similar cases involving "grandfather clauses," the legislation being challenged was enacted pursuant to the State's authority in the area of economic regulation, an area in which wide legislative discretion is permitted. Indeed, the Court in *New Orleans* v. *Dukes*, *supra*, repeatedly emphasized the purely economic nature of the contested ordinance considered therein, and permitted the challenged clause to stand only under the minimal analysis accorded legislation in that area. 426 U.S. at 303-6.

Moreover, these cases upheld true "grandfather clauses": clauses which gave special protections to persons in the class at the time the law was enacted. None of those cases permitted special protection to extend to some persons who enter the class later, while discriminating against others who newly enter it. Here, in contrast, the special protections continued for judges who *re-entered* the class each time they were re-elected by retention election every six years. That is, judges on the bench in 1965 only held certificates of election or retention for the duration of their terms. At the expiration of their terms, they had to be re-elected. A true "grand-

father clause" in the sense of curing an economic problem, if applied here, would have protected the 1965 sitting judges only until the end of their terms. But when they re-entered the class (*i.e.*, the judiciary), through re-election, they should have had to serve under the same restrictions of all new entrants. Here, of course, that was not the case. To obtain legislative support to pass the mandatory retirement act at all, all judges then on the bench received blanket protections *that carried into their future terms of office.* Thus, while all judges were equal in terms of their judicial authority and work, as they were re-elected, some where "more equal" in terms of retirement. Indeed, the 1973 savings clause highlighted the original discrimination while creating a new special discrimination in favor of judges on the bench in that year.

The true "grandfather" cases, therefore, dealt not with a bald dispensation afforded to members of a privileged class merely on the basis of the date they took office, but with exceptions to a new statutory mandate, with the exceptions found to further the new statute's purpose. Obviously, if removal at age 70 insures judicial vigor or serves some other purpose, permitting judges to remain in office for years beyond age 70 does not. Thus, no constitutionally permitted justification exists for the distinctions within the class of judges. Consequently, they are irrational distinctions which violate the Equal Protection Clause and are unconstitutional.[12]

[12] The reliance of the Court below on *Williams* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955) and *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966) is likewise misplaced. In *Williams*, supra, *all* opticians were equally affected. They objected because sellers of ready-to-wear glasses were omitted from regulation. To this objection that a *different and additional* class should have been included

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[12] (Continued)
in the law the Court responded with language permitting "reform . . . one step at a time." In that case, there were no distinctions within the class affected by the law in issue.

In *Katzenbach*, supra, the franchise rights of voters was expanded by the Voting Rights Act of 1965. It was attacked in part on grounds that it extended voting rights to all those who attended Puerto Rico schools, assertedly discriminatory against those who attended schools elsewhere not affected by the law. To this, the Court pointed out that the law expanded the franchise for some people, and did not limit any rights to anyone. Since rights were not being denied or curtailed, once again "reform may take one step at a time . . . ." *Katzenbach*, supra, 384 U.S. at 657. In the case at bar, rights to hold public office are obviously being curtailed, and *Katzenbach* clearly does not apply.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1941

RAYMOND E. TRAFELET, et al.,

Plaintiffs-Appellants,

v.

JAMES R. THOMPSON, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 1036—**Prentice H. Marshall**, *Judge.*

ARGUED DECEMBER 5, 1978—DECIDED MARCH 16, 1979

Before TONE, LAY,* and BAUER, *Circuit Judges.*

TONE, *Circuit Judge.* This action challenges the constitutionality of the Illinois Compulsory Retirement of Judges Act. Section 1 of that Act, Ill. Rev. Stat. ch. 37 §§ 23.71 (1977), provides in substance that a judge is automatically retired after the next general election

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[1] The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

following his 70th birthday.[1] Section 2, *id.* § 23.72, creates grandfather exceptions to § 1, which, so far as they are pertinent here, allow the excepted judges to remain in office until they have served long enough to secure certain pension rights.[2] After a trial, the district court held that the Act did not violate either the United States Constitution or the Illinois Constitution and entered judgment for the defendants. We affirm the judgment.

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[1] Section 1 provides as follows:

> A judge is automatically retired on the first Monday of December next after the general election at which members of the General Assembly are elected immediately following the attainment of age 70 of such judge. Such judge shall conclude all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

[2] Section 2 provides as follows:

> The provisions of Section 1 [23.71] of this Act are suspended, however, with respect to any judge in office on the effective date of this Act [July 20, 1965]. Such judge may continue to serve until the occurrence of one of the 3 following dates whichever occurs last: (1) January 1, 1976; or (2) the date upon which such judge completes 18 years of judicial service in courts of record including all such service rendered prior to, on, and after the effective date of this Act; or (3) the date upon which such judge reaches age 70. The provisions of Section 1 of this Act are also suspended as to any judge in office on June 30th, 1973 who cannot fulfill the minimum eligibility requirements under the Judges Retirement System of Illinois, Article 18 of the Illinois Pension Code [Ill. Rev. Stat. ch. 108½, § 18-101, *et seq.*, (1977)], on the day of his becoming age 70, but who can do so by remaining in office after age 70 for the balance of his current term.
>
> Upon reaching the date provided in this Section 2, whichever is appropriate, such judge is retired on the first Monday in December next after the general election for members of the General Assembly occurring immediately after such retirement date except that such judge shall complete all matters pending before him unless the Supreme Court makes other provisions for the disposition of such matters.

The district court certified two classes of plaintiffs: (1) all judges of the Supreme, Appellate, and Circuit Courts of Illinois whom the Act will force into retirement before the expiration of their certified terms or preclude from running for retention in office;[3] and (2) all registered voters in Illinois who will be denied the opportunity to vote for the judicial candidates of their choice because the Act precludes those candidates from running for election to, or retention in, office. The defendants are the state officers responsible for executing the provisions of the challenged statute.

The plaintiff judges assert several challenges to the Act. Section 1 (§ 23.71) is attacked on two federal grounds:

> (1) It is said to violate the equal protection clause of the Fourteenth Amendment by creating distinctions between judges of the age of 70 and older and judges younger than 70, and between judges and all other elected officials, who are not subject to mandatory retirement provisions. These distinctions, it is argued, are not rationally related to the stated purpose of the Act.
>
> (2) It is said to violate the due process clause of the Fourteenth Amendment by creating an irrebuttable presumption.

Section 2 of the Act (§ 23.72) is attacked on one federal and one state ground:

> (1) It is said to violate equal protection by allowing certain judges to remain in office beyond the

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[3] In Illinois, elected judges who seek another term in office run unopposed on a non-partisan "retention ballot" and must get the affirmative vote of three-fifths of the electors voting on the question. Ill. Const. art. VI, § 6(d) provides in pertinent part as follows:

> . . . The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. . . . The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office . . . .

age of 70 on the basis of criteria unrelated to the purpose of the Act.

(2) It is said to violate Article VI, § 15(a) of the Illinois Constitution[4] by failing to prescribe a single age at which judges must retire.

The plaintiff voters assert that the Act violates their rights under the equal protection clause by discriminatorily denying them the opportunity to vote for candidates of their choice.

The Judges' Claims

1. *Equal Protection Challenges to § 1 of the Act.*

The applicable standard is whether the challenged classification is rationally related to a proper legislative purpose. Neither the right of governmental employment, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), nor the right to run for elective office, *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972), is fundamental. *See* J. Nowak, R. Rotunda, and J. N. Young, *Handbook on Constitutional Law* 686 and 643 (1978) and L. Tribe, *American Constitutional Law*, § 13-19 at 775-777 (1978). Judicial office is no exception. *Napolitano v. Ward*, 457 F.2d 279, 284 (7th Cir. 1972), *cert. denied*, 409 U.S. 1037 (1973). Furthermore, age is not a suspect classification for equal protection purposes. *Massachusetts Board of Retirement v. Murgia, supra*, 427 U.S. at 313-314. Accordingly, like the plaintiffs in *Vance v. Bradley*, ... U.S. ....., 47 U.S.L.W. 4176, 4177 (Feb. 22, 1979), in which the Supreme Court sustained a statute providing for mandatory retirement of Foreign Service officers at age 60, the plaintiff judges here concede that the rational relationship standard is applicable and contend only that the court failed to apply the correct standard properly.

The judges do argue, however, that we may properly consider only those legislative purposes articulated by

[4] Ill. Const. art. VI, § 15(a) reads in relevant part:

> The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age.

the state at the time the statute was enacted. Whatever doubt on this point may have been engendered by language in some of the cases in recent years[5] seems to have been resolved by the Supreme Court's recent opinion in *Vance v. Bradley, supra*. There the Court, referring to the rational relationship standard, said,

> In an equal protection case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

47 U.S.L.W. at 4181. In support of that statement the Court cited several cases stating the standard of whether any state of facts may reasonably be conceived to justify the classification[6] and described *McGinnes v. Royster*, 410 U.S. 263, 274 (1973), with apparent approval as "finding that the legislature 'could have concluded rationally that' certain facts were true." We conclude that we are not limited to the legislative purpose articulated by the state at the time of enactment, although even if we were we would sustain the statute.

A review of the history of the Act reveals its purpose. In creating the Judicial Advisory Council of Illinois in 1957 the Illinois General Assembly provided,

> The Council shall, by continuous study of the problems involved, devise means to effect the improvement of the administration of justice in and

[5] *See White v. Fleming*, 522 F.2d 730, 736 n.8 (7th Cir. 1975). Plaintiffs rely particularly on the statement in *Massachusetts Board of Retirement v. Murgia, supra*, 427 U.S. at 314, that ". . . the State's classification rationally furthers the purpose identified by the State," which is not the same as saying no other purpose would have been considered.

[6] In the first case cited, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), the Court said,

> [I]f any state of facts reasonably can be conceived that would sustain [the changed statute], the existence of that state of facts at the time the law was enacted must be assumed.

> with relation to the State, and to formulate all suggestions and recommendations concerning legislation and other measures designed to bring about such improvement.

Ill. Rev. Stat. ch. 37, § 605 (1957). In pursuit of this goal, the Council recommended the legislation on mandatory retirement that became the Act before us. When that legislation was introduced in the legislature in 1963, the Council announced the specific purpose of § 1 as follows:

> It is the consensus of the Council that a mandatory retirement at age 70 will tend to insure a more vigorous judiciary to which the public is entitled.

Report of the Judicial Advisory Council of Illinois 9-10 (June 1963) (Submitted to the Governor and the Seventy-Third General Assembly of the State of Illinois). Thus it is fair to infer that the purpose of the Act was to further this articulated purpose of insuring a more vigorous judiciary.

Plaintiffs contend that the classification created in § 1 of the Act is not rationally related to that purpose. First, they argue that the state has no rational basis for mandatorily retiring judges but no other elected state officials. Second, they argue that there is no rational basis for treating judges differently when they reach age 70, and that the Illinois laws for removing judges under age 70 from office should serve as well for judges 70 and over.[7]

The legislature could rationally have justified treating judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode. Although the defenders of the statute were not required to establish by evidence a rationality that is obvious from the common experience of mankind, *see Vance v. Bradley, supra*, 47 U.S.L.W. at 4181 & n.28, they nevertheless did so. The district court found that published scientific data, some predating the enactment of the Act in 1965, show an association between aging,

[7] *See* Ill. Const. art. VI, §§ 15(b)-(g), described in note 8, *infra*.

specifically during the sixth and seventh decades of life, and a decline in intellectual function and personality factors. It is irrelevant that evidence was adduced to rebut this data:

> It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916), quoted in *Vance v. Bradley, supra*, 47 U.S.L.W. at 4181.

The equal protection clause does not prohibit the legislature from adopting a more rigorous policy for assuring excellence in the judiciary than for other elective offices. As the Supreme Court said of the Foreign Service in *Vance v. Bradley, supra*, 47 U.S.L.W. at 4179,

> The judgment that the Foreign Service needs such a system more than do many other departments is one of policy, and this kind of policy, under our constitutional system, ordinarily is to be "fixed only by the people acting through their elected representatives."

Citing *Fireman v. Chicago, R. I. & P. R. Co.*, 393 U.S. 129, 138 (1968).

If more were needed, it would also be relevant that judges are the only public officeholders in Illinois who, once elected, are not opposed by another candidate when they seek reelection but rather "run against their records." See note 3, *supra*. Because of this retention system, it is much more difficult to dislodge a judge than an official who must run against another candidate. Mandatory retirement for judges is rationally related to the difference in the retention rights of judges and other elected officials.

Many judges compelled to retire at 70 will still be highly competent. When, however, a statutory requirement of retirement at a given age is tested by the

rational relationship standard, the line drawn by the legislature will be accepted where "[t]here is no indication that [the statute] has the effect of excluding from service so few . . . who are in fact unqualified as to render age . . . a criterion wholly unrelated to the objective of the statute." *Massachusetts Board of Retirement v. Murgia, supra*, 427 U.S. at 315-316. *See also Vance v. Bradley, supra*, 47 U.S.L.W. at 4180-4181 (the classification was not made invalid by "the fact that individual Foreign Service employees may be able to perform past age 60"); *Weinberger v. Salfi*, 422 U.S. 749, 776-777 (1975); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Perfection is not required and whether "we . . . think [the legislature] was unwise in not choosing a means more precisely related to its primary purpose is irrelevant." *Vance v. Bradley, supra*, 47 U.S.L.W. at 4181.

It follows that the existence of other means for evaluating a judge's performance, on which plaintiffs rely, does not render mandatory retirement at age 70 unconstitutional. In *Massachusetts Board of Retirement v. Murgia, supra*, 427 U.S. at 316, the Court stated:

> That the State chooses not to determine fitness more precisely through individualized testing . . . is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation.

If it were necessary to go further, it could readily be demonstrated that here, more than in *Murgia*, there are good reasons to consider individualized evaluations an inadequate substitute for a maximum age limitation. Fitness to be a policeman is more susceptible of objective evaluation than fitness to be a judge, because decline in the intellectual ability and the personality factors essential for effective judicial performance are more difficult to measure than decline in physical condition. The Illinois evaluation means to which plaintiffs refer involve an investigation, a complaint,

and an adjudicative hearing.[8] As a practical matter, this cumbersome individualized removal procedure, attended as it is with stigma to the judge, is unlikely to be used except in the most extreme cases. Informal pressures to retire are scarcely more effective. Usually the reluctance of judges to ask a colleague to step down is exceeded only by his reluctance to do so.[9] It was entirely

[8] The evaluation process, set forth in Ill. Const. art. VI, §§ 15(b)-(g), requires prosecution by a Judicial Inquiry Board in a public hearing before the Courts Commission, which has authority to order, *inter alia*, mandatory retirement of the judge. "A Judicial Inquiry Board is created . . . with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Court Commission . . . . The Board shall prosecute the complaint[s]." The Courts Commission, which consists of one Supreme Court Judge, two Appellate Court Judges, and two Circuit Court Judges, has "authority after notice and public hearing, . . . (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties."

[9] *See* C. Hughes, *The Supreme Court of the United States* 75-76 (1928):

> Justice Field tarried too long on the bench. It is extraordinary how reluctant aged judges are to retire and to give up their accustomed work. They seem to be tenacious of the appearance of adequacy. I heard Justice Harlan tell of the anxiety which the Court had felt because of the condition of Justice Field. It occurred to the other members of the Court that Justice Field had served on a committee which waited upon Justice Grier to suggest his retirement, and it was thought that recalling that to his memory might aid him to decide to retire. Justice Harlan was deputed to make the suggestion. He went over to Justice Field, who was sitting alone on a settee in the robing room apparently oblivious of his surroundings, and after arousing him gradually approached the question, asking if he did not recall how anxious the Court had become with respect to Justice Grier's condition and the feeling of the other Justices that in his own interest and in that of the Court he should give up his work. Justice Harlan asked if Justice Field did not remember what had been said to Justice Grier on that occasion. The old man listened, gradually became alert and finally, with his eye blazing with the old fire of youth, he burst out:

(Footnote continued on following page)

rational for the legislature to believe that the most satisfactory way to insure a vigorous judiciary was to impose a maximum age limitation.

It should be noted also that at least one public purpose in addition to insuring a vigorous judiciary is served by the Act. It can hardly be questioned that the risk of death and disabling illness increases with age. Mandatory retirement thus reduces delays in the administration of justice caused by death or disabling illness of sitting judges.

Our conclusion that mandatory retirement for judges at age 70 does not violate the equal protection clause is supported by the case law involving mandatory retirement of various kinds of governmental officers and employees. *Vance v. Bradley*, *supra*, 47 U.S.L.W. 4176; *Massachusetts Board of Retirement v. Murgia*, *supra*, 427 U.S. 307; *Rubino v. Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, 423 U.S. 891 (1975); *Palmer v. Ticcione*, 576 F.2d 459 (2d Cir. 1978); *Johnson v. Lefkowitz*, 566 F.2d 866 (2d Cir. 1977); *Weisbrod v. Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd summarily*, 420 U.S. 940 (1975); *McIlvaine v. Pennsylvania State Police*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed for want of substantial federal question*, 415 U.S. 986 (1974).

2. *Due Process Challenge to § 1 of the Act.*

Plaintiffs argue that § 1 violates the due process clause by creating an irrebuttable presumption that judges become unfit to hold office at age 70.

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[9] *continued*

"Yes! And a dirtier day's work I never did in my life!"

That was the end of that effort of the brethren of the Court to induce Justice Field's retirement; he did resign not long after.

This anecdote is also recounted in J. Frankel, "Removal of Judges" 48 *Judicature* 177, 178 n. 11 (1965); R. Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* 250 (1972); D. Jackson, *Judges* 275 (1974).

In *Miller v. Carter*, 547 F.2d 1314, 1316-1319 (7th Cir. 1977), *aff'd by an equally divided court*, 434 U.S. 356 (1978), we expressed our uncertainty concerning the scope and continuing force of the doctrine of irrebuttable presumptions, and noted the Supreme Court's failure to refer to the doctrine in *Massachusetts Board of Retirement v. Murgia*, *supra*, which we thought "particularly striking in light of Mr. Justice Rehnquist's dissent in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 659 (1974), adverting specifically to the effect of the irrebuttable presumption doctrine on mandatory retirement statutes." 547 F.2d at 1318 & n.16. Since our decision in *Miller*, the Supreme Court has not relied upon the doctrine in any case, although the Court has had several opportunities to do so. *Vance v. Bradley*, *supra*, is the second mandatory retirement decision in which the Supreme Court has not referred to the irrebuttable presumption doctrine; even Justice Marshall, the lone dissenter, although specifically pointing out that the district court judgment invalidating the statute which the Court was reviewing could be sustained on any ground finding support in the record, did not mention the irrebuttable presumption doctrine. *See also Friedman v. Rogers*, ... U.S. ....., 47 U.S.L.W. 4151, 4153 n.8 (Feb. 21, 1979); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977); *Fiallo v. Bell*, 430 U.S. 787, 791 (1977); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976). *Cf. Elkins v. Moreno*, 435 U.S. 647 (1978). *See deLaurier v. San Diego Unified School District*, No. 75-2096, slip op. at 3536-3537 n.16 (9th Cir. Nov. 2, 1978).

A survey of Court of Appeals opinions written after *Miller* reveals that we have not been the only court "unwilling to plunge unnecessarily into the thicket of irrebuttable presumptions . . . ." 547 F.2d at 1317. Among these opinions we find only one that relied solely on the irrebuttable presumption doctrine to strike down a statute: *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977), held that the Philadelphia School District's policy prohibiting blind teachers from teaching students who were not blind violated due process by creating an

irrebuttable presumption of unfitness. The School District refused to give blind teachers the Philadelphia Teachers Examination, thus depriving them of the opportunity, given to sighted teachers, to prove their competency. The court found it unnecessary to evaluate the equal protection arguments because it affirmed the trial court's due process holding, 556 F.2d at 188, *aff'g Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); therefore we do not know how the Third Circuit views the relationship between the doctrine and equal protection law.

Other courts have uniformly treated the doctrine of irrebuttable presumptions as coextensive with the equal protection clause. *E.g., deLaurier v. San Diego Unified School District, supra*, slip op. at 3535-3538 & n.16; *Fairfax Hospital Assoc. v. Califano*, No. 77-1552, slip op. at 15-20 (4th Cir. Sept. 19, 1978), *Martin v. Harrah Independent School District*, 579 F.2d 1192, 1197-1199 (10th Cir. 1978); *West v. Brown*, 558 F.2d 757, 760 (5th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978). In a series of decisions, most of which involve mandatory retirement statutes, the Second Circuit has concluded that where "the statutory classification is sustainable as rationally based, then it should not fall because it might also be labelled a presumption." *Palmer v. Ticcione, supra*, 576 F.2d at 463 (mandatory retirement for teachers at age 70); *Sakol v. Commissioner*, 574 F.2d 694, 696-698 (2d Cir.), *cert. denied*, ... U.S. ..... , 99 S.Ct. 177 (1978); *Johnson v. Lefkowitz, supra*, 566 F.2d at 869 (mandatory retirement for civil service employees at age 70); *Rubino v. Ghezzi, supra*, 512 F.2d at 433 n.* (mandatory retirement for state court judges at age 70). These cases are consistent with the conclusion reached by Professors Nowak, Rotunda, and Young, in their *Handbook on Constitutional Law, supra* at 497, from an examination of Supreme Court cases applying the doctrine:[10]

[10] *Vlandis v. Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Turner v. Department of Employment*, 423 U.S. 44 (1975); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973).

> It now seems readily apparent that these cases actually rest on an equal protection rationale, for the objectionable portion of each law was the way in which it classified individuals. It was arbitrary classification . . . that was the impermissible basis of these laws. In none of the cases would a "process" have saved the law because the procedure would only have determined whether an individual fitted into one of these arbitrary classifications.

(Footnotes omitted.)

Having concluded that the classification adopted by the legislature is not suspect, does not impair fundamental rights, and is rationally related to a legitimate state purpose, and therefore satisfies the requirements of equal protection, we cannot find it unconstitutional as creating an irrebuttable presumption.

3. *Equal Protection Challenge to § 2 of the Act.*

Plaintiffs argue that, in exempting certain judges from the requirement of retirement at age 70, § 2 violates equal protection because it does not further the purpose of § 1, which is insuring a vigorous judiciary. The weakness of the plaintiffs' position is their failure to acknowledge that § 2 may be rationally related to a different legitimate state interest, and constitutional for that reason. *Cf. Vance v. Bradley, supra*, 47 U.S.L.W. at 4181; *Palmer v. Ticcione, supra*, 576 F.2d at 462-463.

Provision of retirement benefits for former public servants is a legitimate state interest; we doubt that plaintiffs would contend otherwise. Section 2 allows two classes of judges to remain in office long enough to secure pension rights under Ill. Rev. Stat. ch. 108½ § 18-124. See note 2, *supra*. The first consists of judges in office on the effective date of the Act, who are allowed to remain in office long enough to secure maximum pension rights. This is a fair and rational treatment for those who became judges before retirement at 70 was mandatory.[11] The second consists of those judges in of-

[11] We are unpersuaded by plaintiffs' argument that upon continuation in office after a retention election, these judges should have been placed in the same class with other judges

(Footnote continued on following page)

fice on June 30, 1973, who would not qualify for minimum pension rights if retired at age 70; they are allowed to complete the balance of their current terms when by doing so they will qualify for pension rights. However dubious we may be about the rationality of distinguishing between judges in office on that date and those who took office thereafter, when the significance of the date is not explained by anything before us, we cannot hold the Act invalid on this basis. Only judges disadvantaged by the classification would have standing to complain of it. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499-502 (1975), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-227 (1974). Neither any of the named plaintiff judges nor any member of the class they represent complains that he was not allowed to serve until he qualified for a minimum pension while others similarly situated were given that privilege.

Section 2 is a temporary provision that slows the implementation of § 1 to alleviate hardships to individuals. As the Supreme Court has frequently held, when suspect classifications or fundamental rights are not involved, legislatures may implement programs gradually, or step by step, enacting laws "that only partially ameliorate a perceived evil . . . deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303-305 (1976); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

4. *Challenge to § 2 of the Act under Illinois Constitution.*

Plaintiffs argue that the Act fails to provide "a prescribed age" for retirement as required by Ill. Const. art. VI, § 15(a), because § 2 exempts some judges from the Act. This contention is without merit. The Act does provide a prescribed age for retirement in § 1. Section 2's suspension of § 1 as to certain judges specially situated with regard to the pension laws does not, in our

[11] *continued*
who accepted the office with knowledge of retirement laws. The reliance interest of the exempted judges was a sufficient reason for the classification.

opinion, render the Act inconsistent with the Illinois Constitution, the framers of which were aware of § 2. *See* Constitutional Commentary to Ill. Const. art. VI, § 15(a), Ill. Stat. Ann. at 522-523 (Smith-Hurd). Consequently, we conclude that the Act does not violate the Illinois Constitution.

We affirm the district court's holding that the Act does not violate the plaintiff judges' constitutional rights.

The Voters' Rights

Plaintiff voters argue that the Act violates their rights under the equal protection clause by denying them the opportunity to vote for candidates of their choice. They cite *Bullock v. Carter, supra*, 405 U.S. at 134, for the proposition that the state must demonstrate a compelling interest to justify restrictions which have an impact on voters. We do not read the case so broadly.

In *Bullock* the Court began its analysis of the Texas filing fee requirement by observing that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Id.* at 143. The filing-fee requirement created a "disparity in voting power based on wealth," *id.* at 144, because it had the effect of denying ballot access to disproportionately more candidates favored by the less affluent members of the community. Because the requirement "falls with unequal weight on voters, as well as candidates, according to their economic status," *id.* at 144, the Court applied the strict scrutiny standard of review.

No similar or analogous effect, *i.e.*, unequal treatment of candidates or voters identifiable by their economic status or political preferences, occurs here. Any limitation on voting rights is incidental to a classification not aimed at voters or elections. The rational relationship standard is therefore applicable to the claims of the plaintiff voters as well as those of the plaintiff judges.

Illinois State Board of Elections v. Socialist Workers Party, ... U.S. ....., 47 U.S.L.W. 4197 (Feb. 22, 1979), is not inconsistent with our conclusion. Although language in that case, 47 U.S.L.W. at 4200, could be read as subjecting any classification that limits voters' choices, in whatever manner or however incidentally, to a strict scrutiny standard, we interpret that language as referring to the situation before the Court in that case and not as withdrawing *sub silentio* the statement in *Bullock* that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." 405 U.S. at 143. It was consistent with that statement to apply the strict scrutiny standard to a classification that "impairs the voters' ability to express their political preferences." 47 U.S.L.W. at 4200. In both *Bullock* and *Illinois State Board of Elections*, the classification burdened identifiable groups of candidates or voters, identifiable in one case by their economic status and in the other by their political preferences.

Our interpretation of *Bullock* finds support in the decisions of other courts and in the writing of commentators. *Plante v. Gonzales*, 575 F.2d 1119 (5th Cir. 1978), involved a constitutional challenge to Florida's "Sunshine Laws," which require public disclosure of candidates' personal financial information, and which, the court noted, had the effect of precluding persons from running for office. After analyzing *Bullock*, Judge Wisdom, writing for the court, applied the rational relationship test because the Florida restrictions "do not limit the choices of any particular group of voters." 575 F.2d at 1127.[12] In another case the same court concluded that strict scrutiny applies only when "the effect of the restriction was to exclude candidates of an identifiable group or viewpoint." *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 301-302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). The Second Circuit rejected the contention under consideration when it held

[12] The court notes that lower courts and commentators have agreed that age requirements for officeholding "need bear only a rational relationship to state interests." 575 F.2d at 1126 n.10.

that no substantial federal question was presented in *Rubino v. Ghezzi*, *supra*, 512 F.2d 431. *Accord*, *Manson v. Edwards*, 482 F.2d 1076, 1077-1078 (6th Cir. 1973), and *Blessman v. Markworth*, 359 F.Supp. 1, 7 (N.D. Ill. 1973) (three judge panel). *See Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1218 (1975); L. Tribe, *American Constitutional Law*, *supra*, § 13-19 at 775-777.

We therefore affirm the district court's holding that the Act does not infringe the rights of the plaintiff voters.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 24, 1979

Hon. PHILIP W. TONE, Circuit Judge
Hon. DONALD P. LAY, Circuit Judge*
Hon. WILLIAM J. BAUER, Circuit Judge

RAYMOND E. TRAFELET, et al.,
Plaintiffs-Appellants,

No. 78-1941 *vs.*

JAMES R. THOMPSON, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 78-C-1036
PRENTICE H. MARSHALL, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.